HO NIM TSIN

v.

THE DIRECTOR OF LAND AND SURVEY DEPARTMENT & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[CASE NO: BKI-21-47-2010]
13 FEBRUARY 2013

CIVIL PROCEDURE: *Disposal of action without trial - Disposal of case on point of law - Action against public authorities - Declaration that compulsory acquisition of land was unlawful - Whether action time barred - Whether action ought to be dismissed - Public Authorities Protection Act 1948, s. 2 - Rules of the High Court 1980, O. 33 rr. 2 & 5*

LAND LAW: *Acquisition of land - Compulsory acquisition - Declaration that compulsory acquisition of land was unlawful - Land not used for purpose specified for acquisition - Whether there was continuance of injury or damage - Whether action time barred - Public Authorities Protection Act 1948, s. 2*

LIMITATION: *Public Authorities Protection Act - Action against public authorities - Declaration that compulsory acquisition of land was unlawful - Land not used for purpose specified for acquisition - Whether there was continuance of injury or damage - Whether action time barred - Public Authorities Protection Act 1948, s. 2*

The plaintiff's claim against the State Government was related to a land acquisition exercise that was executed way back in 1973 for the purpose of building an institute of higher learning. However, there was no development on the land until 2008 and it was discovered that in 2010, the land had been alienated to three individuals under a new title number. The defendants applied for determination of two questions of law and for the dismissal of the action in the event the preliminary questions are determined in their favour under O. 33 rr. 2 and 5 of the Rules of the High Court 1980. The two questions of law that were set for the determination of the court were: (i) whether the action was time barred pursuant to s. 2 of the Public Authorities Protection Act 1948 ('PAPA'); and (ii) whether the court could grant the remedy prayed for in the writ of summons as the present registered owners were not parties. The defendants contended that the land

A in question was alienated to third parties in 1992, whereas the plaintiff only filed the action after 18 years. Therefore, as limitation is an absolute defence, if it applied to the facts of the instant case, the action ought to be dismissed. The plaintiff, however, relied on the case of *United Development Company Sdn Bhd v. The State*
B *Government of Sabah & Anor* ('*United Development Company*') in its reply to the defendant's contention.

Held (dismissing plaintiff's action with no order as to costs):

C **(1)** The plaintiffs were only pursuing for a declaratory order that the acquisition was unlawful and for compensation and not for re-alienation of the land from its present registered owners who were not parties to the instant action. In the circumstances, the second question was rendered academic. (para 9)
D

(2) The case of *United Development Company* was not applicable as the limitation rule under the PAPA was not an issue in that case, whereas, in the present case, the question of whether limitation had set in was the preliminary issue. Further, the
E decision in *United Development Company* had already been reversed. (para 15)

(3) The plaintiff prayed for a declaration that the acquisition was unlawful because the land was not put to use for the specified
F purpose it was acquired. There was no arguments, *inter alia*, that there was a "continuance of injury or damage", that the notification of the acquisition was not properly gazetted or that the plaintiff was not properly compensated in 1973. As the acquisition process was properly completed, the plaintiff's
G right to the land had been severed. The mere formulation of a declaratory prayer by the plaintiff could not prevent the limitation period prescribed in s. 2(a) of the PAPA from affording an absolute defence to the action (*Balare Jabu & Ors v. Merawa Sdn Bhd & Ors*; dist). (para 20)

H **Case(s) referred to:**

Balare Jabu & Ors. v. Merawa Sdn Bhd & Ors [2011] 4 CLJ 751 CA ***(dist)***

M Palaniappa Chettiar v. ST Sithambaram Chettiar & Ors & Official Administrator, Malaysia [1986] 1 CLJ 430; [1986] CLJ (Rep) 566 HC ***(refd)***

I *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA* ***(refd)***

SI Rajah & Anor v. Dato' Mak Hon Kam & 11 Ors (No. 1) [1994] 1 CLJ 207 HC ***(refd)***
United Development Company Sdn Bhd v. The State Government of Sabah & Anor [2010] 5 CLJ 986 HC ***(dist)***

Legislation referred to:
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 33 rr. 2, 5

For the plaintiff - Vivian Chew; M/s Goh & Assocs
For the defendants - Roderic Fernandez; Sabah State Attorney General

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] This is an application by the defendant under O. 33 r. 2 of the Rules of the High Court 1980 to determine two questions of law and dismiss the action.

Background Facts

[2] The plaintiff's claim against the State Government is related to a land acquisition exercise that was executed way back in 1973. The plaintiff was then the co-owner of 4.87 acres of land held under Provisional Lease No. 13342. The other co-owners were his mother and his siblings. The said land was previously owned by the father of the plaintiff who had passed away in 1959. The plaintiff's complaint is that the land was compulsorily acquired for the purpose of building an institute of higher learning. However, in 2008, the plaintiff noticed that there was no development on the said land and thus he requested for the return of the land. However, his request was rejected. In 2010, the plaintiff discovered that the said land had been alienated to three individuals, ie, Vun Chi Syn, Lin Nyuk Yun and Cheong Sin Fatt under a new title number.

Application Under O. 33 r. 2

[3] Order 33 r. 2 of the Rules of the High Court 1980 reads as follows:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the matter in which question or issue shall be stated.

[4] The defendants have applied for dismissal of the action in the event the preliminary questions are determined in their favour.

[5] Order 33 r. 5 reads as follows:

> **Rule 5. Dismissal of action, etc. after decision of preliminary issue. (O. 33 r. 5)**
>
> If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[6] The two questions of law that were set for determination under the instant summons in chambers are:

1. Whether the action is time barred; and
2. Whether the court can grant the remedy prayed for in the writ of summons as the present registered owners are not parties.

[7] In respect of the second question, apart from a claim for damages, the plaintiff also sought the following remedies:

1. A declaration that the acquisition is null and void;
2. A declaration that the issuance of the new country lease title is null and void;
3. An order that the said land presently held under the new country lease title is alienated back to the plaintiff; and
4. Alternatively, the defendants compensate the plaintiff for the market value of the land.

[8] The grounds of application of the defendants to dismiss the suit are as follows: A

1. The acts and/or omissions complained occurred in 1973 and 1992 and therefore pursuant to s. 2, Public Authorities Protection Act 1948 (Act 198), this action cannot lie or be instituted unless it is commenced within 36 months of the said acts and/or omissions; and B

2. The registered owners of the land held under CL No. 015507383 are not parties in this action and therefore this Honourable Court cannot make any valid orders affecting the rights and interests of the said registered owners which what the plaintiff is in effect praying for in this action. C

[9] In apparent deference to the second ground of the application, counsel for the plaintiff has indicated in her submission D that the plaintiff would only be pursuing for a declaratory order that the acquisition was unlawful and for compensation. Thus the plaintiff is not seeking for re-alienation of the land from its present registered owners who are not parties to the instant action. In the premises, the second question framed in the summons in chambers E is academic and does not require determination. As for the application under O. 33 r. 2, there is ample authority for the proposition that the court has the power to determine any preliminary issue that could conclude the whole proceedings and it would be unnecessary to try the other issues (see *M Palaniappa Chettiar v. ST Sithambaram Chettiar & Ors & Official Administrator, Malaysia* [1986] 1 CLJ 430; [1986] CLJ (Rep) 566; [1982] 1 MLJ 186, *SI Rajah & Anor v. Dato' Mak Hon Kam & 11 Ors (No. 1)* [1994] 1 CLJ 207 and *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337. The preliminary G issue is in respect of limitation law. In the event the issue is decided in favour of the defendants, it would be unnecessary to proceed to trial. It is also my view that the issue whether the action is time barred can be suitably determined upon affidavit evidence for the following reason. The basic facts underlying the H issue of limitation in this case are common ground and not in dispute. There is no dispute that the land was subjected to compulsory acquisition in 1973. There is no dispute that instead of fulfilling the avowed public purpose of acquisition, ie, the construction of an institute of higher learning, the State I

A Government alienated the land to third parties in 1992. There is also no dispute that the plaintiff request for the return of the land in 2008 but was rebuffed. Finally, it is a matter of filing record that the instant action was instituted only on 4 November 2010.

B *Whether Act Of Re-alienating The Land Unlawful?*

[10] The plaintiff's cause of action is based on act of the Sabah government in acquiring the land of the plaintiff for a public purpose and subsequently alienating it to third parties. There is no argument that the acquisition was not completed according to the C proper procedure or that the plaintiff was not compensated. The only complaint is that the land was not used for the construction of an institute of higher learning which was the specified purpose of the acquisition. The argument of the Sabah Attorney General in respect of the limitation issue is as follows.

D

[11] Under s. 2(a) of the Public Authorities Protection Act 1948 (Act 198) (hereinafter referred to as PAPA), the limitation period to commence an action against the government is 36 months. Section 2(a) of the PAPA reads as follows:

E

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or F authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or, in the G case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[12] The land in question was alienated to third parties in 1992. However, the plaintiff only filed this action some 18 years later in H 2010. The above facts are not in dispute as I pointed out earlier. As limitation is an absolute defence, if it applies to the facts of the given case, the Sabah Attorney General submitted that the action ought to be dismissed.

I

[13] The reply by counsel for the plaintiff is two-fold. Her first reply is based on the case of *United Development Company Sdn Bhd v. The State Government of Sabah & Anor* [2010] 5 CLJ 986. The brief facts of that case are as follows. The Sabah Government acquired a parcel of land in 1979 for a resettlement scheme. However, the gazette notification of the acquisition of the land was only published in 1996. The land was not put to use for the purpose it was acquired as the government indicated that it would be used for "Taman Kekal Pengeluaran". The request of the plaintiff for the return of the land was similarly rejected. The parties agreed for the following issues to be tried:

(1) Whether the compulsory acquisition of the said land was *ultra vires* s. 3 of the LAO and/or art. 13 of the Federal Constitution.

(2) Whether the defendants by acquiring the said land had acted *mala fide* by not putting to use the said land for the specified purpose it was acquired.

(3) Whether the plaintiff is still the owner of the said land and if not, whether the plaintiff is entitled to take possession of the said land by paying or refunding to the defendants the sum of RM1 million without interest.

(4) In that event, whether the defendants are liable to pay the plaintiff further compensation and/or damages.

[14] The High Court held as follows:

(1) that the acquisition was unlawful;

(2) that *mala fide* on the part of the government had been established; and

(3) the plaintiff remained as the owner of the land.

[15] However, the above case is not applicable to the issue at hand in the instant case for two reasons. This is because the limitation rule under PAPA was not an issue that was determined by the court in *United Development Company Sdn Bhd v. The State Government of Sabah and Another (supra)*. In the instant case, the question whether limitation has set in is the preliminary issue. In the event this issue is determined in favour of the defendants, it

would be unnecessary to delve into the merits of the claim such whether the act of the Sabah Government in re-alienating the land to third parties was tainted by *mala fide*. The second reason is that the learned Sabah Attorney General submitted without being contradicted by counsel for the plaintiff that the above case was reversed by the Court of Appeal and leave to appeal was refused by the Federal Court.

Whether Action Time Barred?

[16] Counsel for the plaintiff has not disputed that the limitation period under PAPA is only 36 months and that the land in question was alienated to third parties in 1992. However, the mainstay of her argument that limitation has not set in lies in the following passage from the judgment of the Court of Appeal in the case of *Balare Jabu & Ors v. Merawa Sdn Bhd & Ors* [2011] 4 CLJ 751:

> While limitation appears to be a complete answer to a suit, action or proceeding for remedy, **it is no answer to a suit, action or proceeding for declaratory orders.** A declaration whether the issuance of a licence is subject to native customary rights and whether the 2nd and 3rd respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic. (emphasis added)

[17] The appeal of the Sarawak Government to the Federal Court in the above mentioned case was dismissed by the Federal Court. The question of law posed to the Federal Court was as follows:

> Whether the defence of limitation under section 2 of the Public Authorities Protection Act 1948 and/or Sarawak Limitation Ordinance, is an answer to a suit, action, or proceedings for declaration or declaratory orders.

[18] However, in its judgment, the Federal Court did not say that the limitation law is suspended insofar as declaratory prayers are concerned. The above mentioned case concerned customary rights of the natives of Sarawak. A timber licence which is subject to the native customary rights of the plaintiffs had been granted

to the 1st defendant. The licence was still valid and subsisting at the time the action was filed. It is for this reason that the Federal Court ruled as follows:

> As such we are of the view that as long as the Licence remains valid, it continues to be subject to the Respondents' NCR, if any, and rights in respect of the land concerned.

[19] It is for this reason also, the Federal Court relied on the second limb of s. 2(a) of the PAPA which reads as follows:

> ... in the case of a **continuance of injury or damage**, within thirty-six months next after the ceasing thereof; (emphasis added)

[20] However, the factual matrix of the instant case is totally different. In the instant case, the plaintiff has prayed for a declaration that the acquisition was unlawful because the land was not put to use for the specified purpose it was acquired. There is no argument there is a "continuance of injury or damage". There is no argument that the notification of the acquisition was not properly gazetted. There is no argument that the plaintiff was not properly compensated in 1973. As the acquisition process was properly completed, the plaintiff's right to the land had been severed. The plaintiffs in the *Balare Jabu* case on the other hand were able to raise a cogent argument that the timber licence was subject to their pre-existing native customary right. Therefore, it is my opinion that the mere formulation of a declaratory prayer by the plaintiff in the instant case cannot prevent the limitation period prescribed in s. 2(a) of the PAPA from affording an absolute defence to the action.

[21] In conclusion, I shall answer the first question in the affirmative and dismiss the action of the plaintiff. As the learned Sabah Attorney General is not praying for costs, I shall make no order in respect of the same.